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No. 03-658

IN THE

Supreme Court of the United States

JOHN DEEP,

Petitioner,

v.

THE RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC., *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF *AMICUS CURIAE*
ERIC FLINT, AUTHOR,
IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS*

Amicus Curiae Eric Flint (*"Amicus"*) respectfully submits this brief under Rule 37(2)(a)[1] Eric Flint is an author of science-fiction literature who has written nine novels and numerous other works.[2] *Amicus* has

[1] The brief is filed with the written consent of all parties, and was authored in part by Counsel and in part by George David McClure, Jr. of the Kentucky Bar. No person or entity, other than *amicus* or its counsel made a monetary contribution to the preparation or submission of this brief.

[2] Eric Flint's complete bibliography may be found at http://www.ericflint.net/bibliography.htm.

published some of his works, such as "This Rough Magic," through the Internet library source Baen Books, URL http://www.baen.com. Other such Eric Flint books available through Baen Books are "The Shadow of the Lion," and "Forward the Mage." Through Baen Books, some of *Amicus's* works are available at a minimal cost to readers, without substantial remuneration to *amicus*, but with the promise of enhancing *amicus's* literary reputation and promoting sales of others of *amicus's* works. *Amicus* is concerned that the injunction entered in the court below will have a chilling effect on non-infringing uses of Petitioner's Internet service, such as the sharing of *Amicus's* works between Internet "buddies" who have downloaded one or more of *amicus's* literary works available on Baen.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner offers Internet service that allows users to communicate with their online "buddies" and share file attachments, encrypted by the sender and decrypted by the recipient. Shared file attachments may indeed consist of musical works copyrighted by Respondents, and may thus involve an infringement. But innumerable other files of digital information may be shared through Petitioner's service that involve no infringement, such as books published by *amicus* for dissemination on the Internet. *Amicus* strongly opposes the decision of the court below as overbroad and urge this Court to grant the Petition for Writ of Certiorari.

The court below urges a novel interpretation of contributory infringement that, if adopted, would make all encrypted Internet communications illegal unless the providers agreed to redesign their service and to serve as surrogate copyright enforcers. For the reasons

stated by this Court in *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), and for the reasons stated below, *amicus* believes copyright law must be interpreted to preclude the possibility that the development of a new medium of communication could be prohibited simply because it is capable of misuse.

Amicus believes that (1) Petitioner's liability cannot turn on an analysis of the percentage of current use that constitutes direct infringement; (2) authors, innovators and providers should not be required to modify their work or services to facilitate enforcement of copyright by certain copyright holders such as Respondents; and (3) free speech and the public interest would be served by rules that allow new and innovative mediums of communication to develop and flourish.

The First Amendment embodies "our profound national commitment to the free exchange of ideas." *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002). *Amicus* believes in the free market of ideas and advocates for an educated and highly informed citizenry. This case is not simply about college students who believe that they should not have to pay for music when they can simply download it from the Internet. Rather, at stake in this case is the fundamental issue of whether citizens can be denied valuable technological tools for sharing information and ideas simply because some may use those tools for improper purposes. *Amicus* urges this Court to recognize that the law must not be allowed unduly to impede the non-infringing, socially and commercially valuable uses of new powerful technologies.

STATEMENT OF FACTS

A. Petitioner's Internet Service Is Obviously Capable of Substantial and Valuable Non-infringing Uses.

Amicus here distributes his authored works through libraries, ranging from more traditional brick-and-mortar libraries to Internet-based libraries such as the Baen Library (www.baen.com). These distinctions, however, become less precise in the digital age, as all libraries are relying to a greater degree on the Internet and other forms of electronic communication to provide access to vast amounts of digital material. Accordingly, *amicus* has a strong interest in the outcome of this case because of the potential for non-infringing use of Internet service to share information in such areas as medicine, law, and science; to archive historical documents; and to provide electronic access to a broad range of public domain information, including government documents.

Libraries seek to maximize literacy, education, and entertainment through the free distribution of information. Internet services such as Petitioner's can be of massive assistance in achieving that goal. For example, Project Gutenberg, another Internet library, makes available electronic copies of books that are either in the public domain or whose authors have given their consent. Consequently, there are currently over 9,500 books available through Project Gutenberg.

Still another Internet library, the Internet Archive Project, is an effort to archive the World Wide Web. The amount of material now available through the Internet Archive through a Web-based system is enormous. Approximately 1 terabyte of data is downloaded from the

Internet Archive each day. This would be the equivalent of 200,000 MP3 songs each day. Much of the Internet Archive is text-based material but both the number and percentage of audio and video files are increasing rapidly. All of these audio and video files are non-infringing .

For entities like Project Gutenberg, The Baen Library and the Internet Archive, Web-based distribution of material in such volume can become tremendously expensive and, at a certain point, cost-prohibitive. Specifically, Web-based publishing requires the host to bear the bandwidth costs associated with traffic to and from its site.

For that reason, *amicus* strongly support the use of Petitioner's *buddy-to-buddy* technology, frequently referred to as "peer-to-peer" technology. Petitioner's technology uses messaging and file-attachments to redirect user traffic to online "buddies" using peer computers throughout the electronic community, and ultimately facilitates broad dissemination of information.

Amicus and other producers of copyrighted material also rely on peer-to-peer networks to gain wider distribution of their work. Up-and-coming artists who do not have a large record label promoting their work rely on peer-to-peer technology to create a "buzz" among listeners. *See* Chris Nelson, *Upstart Labels See File Sharing as Ally, Not Foe*, N.Y. TIMES, Sept. 22, 2003, at C1. Likewise, many authors have given Project Gutenberg permission to distribute their work in the hopes of reaching a broader audience. *Amicus* makes this effort through the Baen Library, which makes *Amicus's* works available on the Internet at a minimum cost. Even established artists use messaging and file-attachment technology for commercial purposes. For

example, some well-known musicians encourage their fans to share recordings of live shows to spur attendance at concerts, which are their main source of income (as opposed to royalties). *See* Neil Strauss, *File-Sharing Battle Leaves Musicians Caught in Middle*, N.Y. TIMES, Sept. 14, 2003, at A1.

Moreover, news reports have revealed that Respondents themselves use peer-to-peer programs as a kind of Neilson rating system, counting the popularity of downloads and using that information to guide their decisions about which bands to sign and which CDs to promote. *BigChampagne Is Watching You*, WIRED MAGAZINE, Issue 11.10, Oct. 2003, *available at* http://www.wired.com/wired/archive/11.10/fileshare.html (visited Sept. 26, 2003). They also use it to target regions of the country for promotion when a band or artist is particularly popular in that region. *Id.*

In light of these facts, it is both obvious and undisputed that this technology is capable of numerous non-infringing uses. *See, e.g., Aimster, 344 F. 3d at 651* (the issue is not merely whether the "file-sharing system *could* be used in non-infringing ways, which obviously it could be") and *Id.* at 652 (further explaining that at least five "examples of actually or arguably non-infringing uses of Aimster's service are possibilities"); *see also, e.g. Metro-Goldwyn-Mayer Studios v. Grokster*, 259 F. Supp. 2d 1029, 1035 (C.D. Cal. 2003) ("it is undisputed that there are substantial non-infringing uses" for file-sharing software). Rather, the court below decides that the amount of infringing use somehow nullifies the importance of these numerous non-infringing uses.

Furthermore, in addition to the non-infringing uses of this technology that are already known, Petitioner's

software is capable of an enormous number of additional non-infringing uses. For example, as political campaigns move on-line, it is likely that candidates will turn to peer-to-peer technology to distribute position papers and campaign videos. *Cf.* Ryan P. Winkler, *Preserving the Potential for Politics Online: The Internet's Challenge to Federal Election Law*, 84 MINN. L. REV. 1867, 1868-71 (2000) (noting the Internet's advantages – *i.e.*, low cost and decentralization – for political activism). Particularly in this context, the cost savings of peer-to-peer distribution would clearly make it a superior alternative to other forms of Web-based political organizing, a phenomenon which itself has only started to take hold. *See id.*

Likewise, people living under totalitarian regimes that censor "unpatriotic" or "inappropriate" websites will be able to access information from anywhere in the world by using peer-to-peer technology.[3] New *Technology May Foil PRC Attempts at Censorship Efforts*, THE CHINA POST, March 12, 2003, *available at* 2003 WL 4136640 (noting that Internet users in mainland China are unable to access information on subjects such as Taiwan, democracy, Tibet, Falun Gong, and major news sites such as CNN and BBC); *see also Beijing Juggling Internet Expansion and Censorship*, THE CHINA POST, March 20, 2003, *available at* 2003 WL 4136745 (recognizing potential of peer-to-peer technology as a way "of circumventing Beijing's prying eye").[4] Among the

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[3] *See* Jennifer Lee, *Grass-Roots War Heats Up Against Government Web Blocks*, CHICAGO TRIBUNE, Oct. 14, 2002, at 4 (noting that China, Saudi Arabia, Myanmar, Laos, Yemen and the United Arab Emirates are among the countries the engage in Internet surveillance and censorship).

[4] One of the peer-to-peer system currently being used in China is called the "Six/Four System," which refers

documents that have been shared on peer-to-peer networks in China are the Tiananmen Papers, which are a compilation of the transcripts from 1989 meetings among Chinese leaders in the aftermath of the student protests.[5] Although peer-to-peer technology may not provide a foolproof method for avoiding government censorship, it will certainly be much more difficult for totalitarian states to stifle the flow of information on peer-to-peer networks than to block a handful of websites.

The court below also describes the filtering mechanisms in Petitioner's software that permit sharing *only* with buddies. *See Aimster*, 334 F. 3d at 646. (a user may either "designate a buddy or buddies," or "*all* the users of the Aimster system [may] become his buddies"). Using this mechanism, a user who wants to avoid potentially pornographic files, or who fears downloading a virus or other untrusted file can choose to share only with trusted buddies.

Although Petitioner's software does include a filtering mechanism for sharing only with buddies, only the *user* can enable the filter and determine what kinds of files will be screened. But the current technology does not have any method by which Petitioner could override the wishes of the user or block particular files.[6]

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to the date of the Tiananmen Square massacre on June 4, 1989. *See* Jim Rapoza, *Six/Four: The Internet Under Cover*, EWEEK FROM ZDWIRE, March 6, 2003, *available at* 2003 WL 5734694.

[5] *See* Lee, *supra* note 3.

[6] Even though defendants have no obligation to install filtering software, it is unclear whether they would even be able to develop a program that *only* blocked infringing files. For example, any compulsory filter that

Predictions about the manner in which a new medium of communication will develop are notoriously unreliable. Therefore, Respondents' emphasis on how people are currently using this software is misplaced. Respondents here initially predicted that videocassette recorders would destroy their business. Yet, as we now know, not only did companies like Respondents not suffer, instead they actually experienced a financial windfall due to the development of this new market. For similar reasons, *amicus* believes that peer-to-peer software, if permitted to develop naturally, will increasingly be used for the distribution of additional non-infringing material, in the same manner as *amicus* presently does. As more people become aware of resources like the Baen Library, the Internet Archive and Project Gutenberg, and become aware of the potential of peer-to-peer systems to permit evasion of state censorship schemes, the non-infringing traffic on these user networks will undoubtedly continue to grow. Consequently, *amicus* urges this Court not to close off prematurely the development of a new technology that already has demonstrated such significant non-infringing uses.

ARGUMENT

I. Petitioner's Liability Cannot Turn on an Analysis of the Percentage of Current Use That Constitutes Direct Infringement.

The court below placed tremendous emphasis on its assumption that a very large percentage of the

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screened out MP3 files would block non-infringing MP3 files as well as infringing ones.

files currently being shared by users of Petitioner's software are infringing. However, the percentage of current uses that are infringing is largely irrelevant as a matter of law. It fails to recognize that non-infringing uses need not be the majority but need only be substantial. It also fails to recognize this Court's holding that the future possibility of non-infringing uses is sufficient for Petitioner here to prevail. Not only is the emphasis by the court below on the percentage of infringing uses wrong as a matter of law, it would lead to results that would harm free speech and the development of new technology. In *Sony*, this Court explained that the pivotal question was whether the Betamax machine was "capable of commercially significant non-infringing uses." *Sony*, 464 U.S. at 442. This Court found that it "need not give precise content to the question of how much use is commercially significant." *Id.* In fact, this Court rested its decision on the fact that the technology was capable of *one* potential use that was non-infringing : timeshifting.[7] *Id.* ("one potential use of the Betamax plainly satisfies this standard, however it is understood: private, non-commercial time-shifting in the home").[8] Accordingly, as the Betamax was "capable of substantial non-infringing uses," this Court ruled that Sony's sale of the product did not constitute contributory infringement. *Id.* at 456. The Ninth Circuit has likewise emphasized that the critical question is not the current uses but whether the software can be used in the future for non-infringing purposes. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1021 (9th Cir. 2001).

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[7] Time-shifting is the practice of recording programs for viewing at a time other than the time of broadcast. *See Sony*, 464 U.S. at 421.

[8] This Court also acknowledged that the Betamax could be used for authorized recording, another non-infringing use. *See id.* at 443-47.

Amicus discussed other likely future non-infringing uses above. As noted, such non-infringing uses would be likely to increase both in volume and in percentage as users become more familiar with this technology. Considering the millions of file attachments – and countless other communications – presently being conveyed over the Internet, the non-infringing speech taking place on Internet services cannot be dismissed lightly. Contributory infringement liability does not become automatic simply because the percentage of infringing use seems "too high." Regardless of whether a product is used as a means of infringement 90% of the time, 75% of the time, or 40% of the time, the court must focus its attention on the value of the non-infringing uses of the product. If this Court had adopted the approach advanced by the court below, not only would the Sony Betamax have been banned, but video cassette recorders, or CD burners, or DVD recorders could still be banned today so long as a plaintiff showed that these mechanisms are now used for infringing purposes by whatever the magic percentage is determined to be. No developer of a technology that has infringing uses would ever truly be safe from liability. Xerox might be liable for contributory infringement if a certain percent of its copiers were being used to violate copyright law. E-mail might be banned if copyright holders could show that X percentage of e-mails are infringing. Microsoft Word might be banned if copyright holders could show that it is being used X percentage of the time to plagiarize. These are unthinkable outcomes.

Nevertheless, the court below decides, in essence, that when a technology is used primarily for infringing purposes, the non-infringing speech that also relies on the technology can be sacrificed as collateral damage, regardless of its value. Fortunately, this Court has already rejected a rigid "percentages test," *Sony*, 464 U.S. at 491 (Blackmun, J., dissenting) (advocating for

percentages test), and opted instead for a test that focuses on a technology's capacity for non-infringing use. *See id.* at 442. Accordingly, when assessing the value of a technology's non-infringing use, this Court has considered not only the value to the individuals who are actually exchanging files, but has also taken into account the benefits that can accrue to the public at large as a result of the free flow of important information. For example, after the "blaster virus" spread through the Internet, paralyzing those relying on Microsoft operating systems, users of peer-to-peer technology shared files designed to repair the damage and protect other users from infection.[9]

Finally, just as the *Sony* test better preserves the value of non-infringing uses, so too is it more sensitive to the fact that certain uses of technology will ebb and flow over time. The first users of peer-to-peer technology undoubtedly comprised a very specific subgroup of technologically-savvy computer users. But as more people become familiar with file-sharing technology, the percentage of non-infringing use on these networks will undoubtedly increase. Just as the market for rental and sale of pre-recorded videos took time to develop after the Betamax was invented, so too will the non-infringing uses of peer-to-peer technology surely grow over time. Accordingly, the *Napster* Court ruled that the district court erred when it "improperly confined the use analysis to current uses, ignoring the system's capabilities." 239 F.3d at 1021. For all of these reasons, this Court should continue to apply the

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[9] *See Pornography, Technology and Process: Problems and Solutions on Peer-to-Peer Networks Before the Senate Judiciary Committee*, 108th Cong. (Sept. 9, 2003) (Statement of Alan Morris), *available at* http://judiciary.senate.gov/testimony.cfm?id=902&wit_id=2277 (visited Sept. 24, 2003).

wisdom of the *Sony* decision.

II. The Provider of Internet Service Should Not Be Required to Monitor His Encryption Technology to Facilitate Enforcement of Copyright by Respondents.

Although Petitioner's Internet service is a computer program rather than physical hardware, this is not the relevant distinction. Just as the *Sony* Court found that the sale of a VCR did not create any kind of agency or control relationship between the buyer and the seller, so too should this Court recognize that the sale of a computer program does not transform the consumer and user of the program into an agent whose actions can be attributed to the program's manufacturer. *See In re Aimster Copyright Litigation*, 334 F.3d 643, 654 (7th Cir. 2003) ("The teenagers and young adults who use Aimster's system to infringe copyright are of course not Aimster's agents.").[10]

The control requirement of the vicarious liability standard serves a similar function as the material contribution prong of the contributory liability analysis. In short, a defendant may not be held liable by default; it must have the ability to prevent a third party's infringement before being held secondarily liable for that conduct. Although this Court did not clearly delineate

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[10] Notably, in *Aimster*, the Seventh Circuit did not affirm the district court's determination that the defendants were also vicariously liable for infringement. 334 F.3d at 654-55. While commenting that it was "less confident" that the plaintiffs would prevail on that claim, the court found that it was unnecessary to "resolve [its] doubts in order to decide the appeal." *Id.* at 654.

the distinctions between vicarious and contributory liability, its decision in *Sony* makes clear that a manufacturer has no duty to alter its technological design to prevent any possible misuse by third parties, so long as substantial non-infringing uses of its technology (as originally designed) exist. *See Sony*, 464 U.S. at 494 (Blackmun, J., dissenting) (arguing in favor of forced modification).

The record is apparently clear that Petitioner developed encrypted Internet service at least for the specific purpose of selling licensed encrypted music in an online retail venture. Still, the court below speculates that Petitioner may have specifically structured his technology so that he could avoid secondary liability for the infringing activities of users of his software, characterizing such a deliberate attempt as "willful blindness."

Whether or not that is true, this Court should recognize the independent virtues of encryption in the realm of electronic communication. Encryption is necessary to the creation and protection of a private instant messaging network. And the protection of private communications over the Internet is a matter of significant public policy to Congress. When Congress amended the Copyright Act in 1998 through the Digital Millennium Copyright Act ("DMCA"), it expressly sought to ensure that personal privacy for Internet communications would not be diminished. *See* 17 U.S.C. §§ 512(m), 1205. Indeed, the DMCA legislative history suggests that passage of the anti-circumvention provisions of the Act would "substantially enhance the degree to which individuals may protect their privacy as they work, play and communicate on the Internet." S.Rep. No. 105-190 at 18 (1998). In addition, the privacy of Internet communications is protected through the Electronic Communications Privacy Act, which

prohibits unauthorized interception or access of electronic communications. 18 U.S.C. §§ 2511, 2701.

Furthermore, a requirement of mandatory monitoring or control, coupled with ever expansive secondary infringement liability, may result in dramatically increased, and in many cases, overly zealous censorship by companies that are far more interested in avoiding liability than preserving non-infringing speech. *See* Alfred C. Yen, *Internet Service Provider Liability for Subscriber Copyright Infringement, Enterprise Liability and the First Amendment*, 88 GEO. L.J. 1833, 1871 (2000).

Furthermore, as noted earlier, encryption does facilitate communication with citizens in countries whose governments actively oppose free speech as a matter of official policy. *See supra* at 12-13. Forcing software companies to incorporate methods to monitor users and choke points to control the flow of information will only make it easier for the governments in China, Saudi Arabia and other totalitarian regimes to clamp down on speech with which they disagree. Therefore, notwithstanding Respondents' insistence that all technology developers should be required to modify their products to maximize surveillance and control, this Court should not ignore the fact that such a rule would come at the expense of the free speech and expression protected by our Constitution and international human rights norms.

In light of the virtues of encryption in the electronic realm, this Court should not mandate that technology designers incorporate a particular level of surveillance and control over users of its products.

III. Free Speech and the Public Interest Are Served by Rules That Allow New and Innovative Mediums of Communication to Develop and Flourish.

Amicus certainly does not condone the violation of copyright law. But the interests of individual copyright holders should not be allowed to eviscerate other crucial protections of the First Amendment. *See Harper & Row Publishers, Inc. v. Nation Enterps.*, 471 U.S. 539, 582 (1985) (observing that limitations on copyright are appropriate when necessary to "ensure consonance with our most important First Amendment values"). The First Amendment creates a strong presumption in favor of speech and against regulations that would operate as prior restraints on speech. *See Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) ("Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity."). The decision below turns this presumption on its head by suggesting that the abuses committed by some of those who use Internet service can justify cutting off all other users, including those who are engaging in valuable and constitutionally protected speech.

This Court has noted that electronic communication allows "any person with a phone line . . . [to] become a town crier with a voice that resonates farther than it could from any soapbox." *Reno v. ACLU*, 521 U.S. 844, 870 (1997). This is particularly true for peer-to-peer messaging technology, which facilitates pure speech to a greater degree than virtually any other technology available today. Therefore, just as with the Internet, there is "no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium." *Id.* Accordingly, the non-infringing communication that takes place on these user networks is entitled to full constitutional protection.

As explained *supra*, Petitioner's technology provides users with an easy and inexpensive way to communicate with each other. Particularly for digital libraries and other entities devoted to public education and the free flow of information, peer-to-peer technology provides the most cost-effective and in some cases the only feasible alternative for accomplishing their mission. Likewise, there are many who use this technology for valid commercial reasons, such as product promotion and distribution, and market research. Whereas Web-based publishers incur significant and increasingly prohibitive costs for bandwidth and storage, peer-to-peer systems allow the data to remain with individual members of the network, spreading out storage costs and dispersing web traffic throughout the network. In fact, in many ways, peer-to-peer technology serves the same purposes and provides the same benefits as system caching,[11] a practice which Congress recognized as valuable and chose to accommodate in the Digital Millennium Copyright Act, Pub. L. 105-304, 112 Stat. 2860, codified at 17 U.S.C. § 512(b).

Respondents are essentially asking this Court to shut down technology unless it conforms to specifications dictated by copyright holders. Although copyright law certainly bestows significant rights upon copyright holders and is itself an important mechanism for promoting valuable speech, Respondents have no right to veto new technology simply because it may enable oth-

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[11] "System caching" is the process whereby a computer system or network automatically makes a temporary copy of material provided to it by a third party "for the purpose of making the material available to users of the system or network who . . . request access to the material from the [third party]." 17 U.S.C. § 512(b)(1).

ers to violate their rights.[12] Such a rule would run fundamentally counter to the interests of the public, whose well being depends on scientific advances and technological breakthroughs.

As this Court made clear in *Sony*, so long as a technology is capable of substantial non-infringing uses, a court may not effectively ban the technology simply because some have chosen to abuse its capabilities. *See Napster*, 239 F.3d at 1021 ("To enjoin simply because a computer network allows for infringing use would, in our opinion, violate *Sony* and potentially restrict activity unrelated to infringing use."); *In re Aimster*, 334 F.3d at 649 ("The [Supreme] Court was unwilling to allow copyright holders to prevent infringement effectuated by means of a new technology at the price of possibly denying non-infringing consumers the benefit of the technology."). Petitioner's technology is obviously capable of numerous valuable non-infringing uses. Accordingly, Petitioner is entitled to the protections of *Sony*, and Respondents' contributory and vicarious infringement claims against him should properly be rejected.

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[12] Respondents obviously have every right to include reasonable copy control protections on their songs and videos. In fact, some artists have already begun experimenting with such techniques. *See* Mike Snider, *Anti-Swap CD Hits the Racks*, USA TODAY, Sept. 23, 2003, at D6.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

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